United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6095

ORIGINAL

To be argued by
TOBIAS WEISS

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

LOUIS D. DEBERADINIS, JR.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATUTES CITED

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Preliminary Statement

This is an appeal from a "ruling" of Judge T. Emmet Clarie, dated January 6, 1975, denying defendant's motion for summary judgment; and from a judgment, in the amount of $63,886.41, dated July 31, 1975, rendered for plaintiff after trial by Senior District Court Judge Richard H. Levet, sitting by designation at Bridgeport, Connecticut.

This action was started by a complaint, filed in the United States District Court for Connecticut, by the United States on January 23, 1970, to recover a penalty from Defendant Louis DeBeradinis, Jr. asserted by the Internal Revenue Service under § 6672 of the 1954 Internal Revenue Code (herein referred to only by section number). The penalty was based on the failure of McFaddin Express, Inc. to pay over certain taxes.

References herein to the Record On Appeal will be to the Document No. (Doc. No.), as it has been listed by the

clerk of the District Court. References to the transcript of testimony at trial, will be to "Tr." and page number; and references to exhibits will be to "Ex." and the designation.

The Issues

1. Did the district court, denying defendant's motion for summary judgment, properly dispose of that motion?

2. Is the penalty of $34,055.59, under § 6672 of the Internal Revenue Code, for the entire second quarter of 1959, or is it only for the portion of the quarter ending May 21, 1959?

3. Was defendant a "responsible officer" of McFaddin under § 6672 for the second quarter of 1959?

4. Is the penalty under § 6672 improper where the unpaid tax is the fault of IRS, which refused to collect the tax?

5. Did IRS properly apply, in satisfaction of unpaid taxes of McFaddin, funds recovered by DeBeradinis through litigation maintained by him?

6. Was the trial court correct in excluding certain items of evidence?

The Facts

The statement of facts at this point is only a brief overview because, first, some of the essential facts and related evidence is discussed more extensively in connection with particular issues hereafter; and, secondly, the facts are presented in great detail, and with very specific supporting references to the evidence, in Doc. No. 26 of the Record On Appeal. The court is respectfully referred to that portion of the Record On Appeal.

Defendant DeBeradinis organized (in 1953), and was the owner of, substantially all the stock in McFaddin Express, Inc. (McFaddin), a Connecticut corporation. McFaddin was in the business of interstate trucking of freight, and was subject to regulation by the Interstate Commerce Commission (ICC).

By 1958 and 1959, McFaddin had become a very substantial business, with 11 terminals (owned or rented) spread over a number of states; with a fleet of vehicles including 60 tractors and 100 semitrailers; substantial repair facilities, office equipment, and inventories of parts and supplies; and 270 employees. By the beginning of 1959, it had over 5,000 customers and gross income of $60,000 per ~~month~~ WEEK, or an annual gross revenue of about $3,000,000 per year.

McFaddin's office and main terminal was at Stamford, Connecticut.

However, McFaddin's rapid expansion, multiplying costs, and labor difficulties created financial problems. By the beginning of 1959, McFaddin had experienced some considerable losses, which, at the beginning of 1959, were mounting. DeBeradinis found himself unable to cope with these problems, and, prior to 1959, began negotiations for the sale of McFaddin to The Adley Express Company (Adley).

Adley was in the ~~same~~ same business as McFaddin, and likewise was regulated by the ICC. But Adley was one of the largest truckers on the east coast, with very substantial liquid assets and with an organization which stretched from the Carolinas in the United States up into Canada.

Adley's office and headquarters was at New Haven, Connecticut.

Adley, with its experience and expertise, made a thorough study of McFaddin and its operations in 1958; that study took several months, and Adley determined for itself Mc-

Faddin's income, assets, obligations and operations as of the end of 1958 and the beginning of 1959. Adley concluded that, with its resources and management, it could salvage McFaddin and realize a very substantial profit from the McFaddin freight. Thus, Adley's operating territory included McFaddin's territory, and Adley could carry on the McFaddin business with very considerable economy.

By March of 1959, DeBeradinis and Adley reached an understanding for the sale of McFaddin to Adley, through a sale of the stock in McFaddin. By that time there were already Adley management personnel at the McFaddin office at Stamford. Adley agreed to pay $125,000 for McFaddin, and to take over McFaddin in its then condition, geared into McFaddin's circumstances as of the beginning of 1959. The drafting process then began, and two contracts resulted which were signed on April 20, 1959.

Two contracts were needed because of the regulation by the ICC. The sale could not be made until approved by the ICC. But, in the meantime, since a sales price had been agreed to which was geared into the beginning of 1959, Adley had to take control of McFaddin's management without waiting for that ICC approval of the sale. The two contracts were the "sales contract" and the "management contract."

By May 7, 1959, applications to the ICC for its approval were prepared and filed with the ICC. And the next event relating to the ICC in this case occurred on May 21, 1959, when the ICC issued an order approving the management contract and Adley's operation of McFaddin under the terms of the management contract.

But in view of its exposure under the sales contract, Adley could not wait for the ICC approval on May 21, 1959. Adley took over the management of McFaddin when oral agreement was reached on the contracts, and was in full control of McFaddin by the time the contracts were signed on April 20, 1959. Adley's exposure and McFaddin's very

precarious position, made it necessary for Adley to take that step, and made it impossible for DeBeradinis to resist. From that time until the ICC order of May 21, 1959, Adley exercised de facto, actual control over McFaddin's operations. With the issuance of that ICC order, Adley emerged into open control of McFaddin.

When Adley was able to take open, public control of McFaddin, the sales contract had not yet been approved by the ICC, and the sales price had not been paid. Adley nevertheless then proceeded to appropriate McFaddin's assets, business, and customers. But Adley neglected and ignored McFaddin's obligations and creditors. Eventually Adley swallowed McFaddin and destroyed it as a separate business, but left its obligations outstanding. That resulted in a long, bitter litigation brought by DeBeradinis against Adley in which, after eight years and an ordeal through a number of courts, DeBeradinis recovered a judgment against Adley in the Superior Court of Connecticut.

During its period of financial difficulty, McFaddin became delinquent in its tax payments to the Internal Revenue Service (IRS). Those taxes included both amounts which were withheld and amounts which were not withheld. In October 1958, McFaddin, while controlled by DeBeradinis, made an arrangement with IRS, as approved by the IRS, for monthly payments of $2,000 and then $3,500 on the delinquent amounts. That arrangement was meticulously observed by McFaddin while under DeBeradinis' control.

Those delinquent taxes, and the United States as a creditor, together with McFaddin's other obligations, was a principal consideration in the transaction between DeBeradinis and Adley, and that is reflected in the contracts between them. IRS was informed of the transaction between DeBeradinis and Adley, and IRS met with Adley officials and obtained their promise to continue the monthly

payments. However, as Adley absorbed and destroyed McFaddin, Adley also stopped those payments, and ignored and rejected IRS inquiries for payment.

At the same time, Adley was appropriating McFaddin funds and assets with U. S. tax liens against them. DeBeradinis became aware of what Adley was doing to McFaddin, as IRS became aware of Adley's refusal to have any payment made on McFaddin's taxes. DeBeradinis therefore repeatedly proposed to IRS, and pleaded with IRS, to proceed against the McFaddin assets and against Adley in order to obtain payment of the tax delinquencies. The IRS, however, refused to do so. Instead, after waiting until McFaddin was no more than an empty shell, IRS took the token step of suing McFaddin for the unpaid taxes; but, as could be expected, McFaddin did not have assets to satisfy the resulting judgment for the Government.

Because of the IRS refusal to proceed against the McFaddin assets or against Adley, as by levy on assets which had U. S. tax liens, a very substantial portion of the McFaddin taxes remained unpaid. IRS then used its numerous powers to go against DeBeradinis, still refusing to take any steps against Adley, even though Adley was the culprit, as confirmed by the Superior Court of Connecticut. Part of the IRS action against DeBeradinis was to assess penalties against him, under § 6672 of the Code, for the unpaid McFaddin taxes. It is one of those penalties, for the second quarter of 1959, which is in issue in this case.

ARGUMENT

I.

The Denial of Defendant's Motion for Summary Judgment Was Contrary to the Requirements of FRCP 56. At the Very Least, the Court Should Have Found the Facts, Based on the Affidavits and Exhibits, Which Were Without Substantial Controversy, and the Trial Should Have Been Conducted Accordingly.

(a) Denial of Motion for Summary Judgment Is an Interlocutory Order Appealable After Judgment.

Denial of defendant's motion for summary judgment was an interlocutory order, which did not dispose of this case, and which was not appealable when that order was made, in accordance with the policy against piecemeal appeals and the applicable federal statutory provisions. *28 USC § 1291; U. S.* v. *Florian,* 312 U.S. 565 (1941); *Chappell & Co.* v. *Frankel,* 367 F. 2d 197 (CA2, 1966).

The order denying defendant's motion for summary judgment is appealable at present, after final judgment. Thus, denial of defendant's motion for summary judgment was entertained after jury trial in *Savarin Corp.* v. *Nat. Bank of Pakistan,* 447 F. 2d 727 (CA2, 1971).

(b) The Papers Filed For and Against Defendant's Motion for Summary Judgment.

Defendant filed the following in support of his motion for summary judgment:

(1) Detailed sworn affidavit of fact by defendant, consisting of 29 pages of legal size paper (Doc. No. 16).

(2) Detailed sworn affidavit of fact by Tobias Weiss, consisting of 20 pages of legal size paper (Doc. No. 15).

(3) Three exhibits, representing supporting evidence, submitted with defendant's above sworn affidavit (see exhibits annexed to Doc. No. 16).

(4) Fifteen exhibits, representing further supporting evidence, submitted with above sworn affidavit of Tobias Weiss (see exhibits annexed to Doc. No. 15).

The foregoing sworn affidavits and supporting exhibits presented defendant's position and supporting evidence in extensive detail.

Plaintiff filed in opposititon to defendant's motion for summary judgment and the foregoing sworn affidavits and exhibits, presenting extensive detail: Nothing within FRCP 56.

The only thing that was filed by plaintiff was a brief argumentative memorandum, with no attempt made to present or contradict any facts (see Doc. No. 18). That memorandum was not an affidavit or a sworn statement or under oath. Indeed, that memorandum was almost entirely under a heading entitled "Argument." There was no denial in that memorandum, or anywhere else by the plaintiff, of the facts asserted in those detailed affidavits and exhibits. As discussed below, that memorandum clearly was an improper and insufficient response to defendant's motion and supporting sworn, factual evidence.

The sworn affidavits, totalling 49 pages of factual matter, and the 18 supporting exhibits, therefore remained unopposed within the rules of FRCP 56. There was no denial of the facts asserted in those affidavits and exhibits. Therefore, the motion should have been granted; or, at the least, the facts should have been found by the court as presented in those affidavits and exhibits under FRCP 56(d) and, any issues of law involved, should have been decided on the basis of those facts.

(c) The Requirements of FRCP 56 and the Applicable Decisions.

FRCP 56(c) provides for a summary judgment where there is "no genuine issue as to any material fact."

Even where summary judgment on the case is not to be rendered, FRCP 56(d) directs the court to "ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." The court is required to "make an order specifying the facts that appear without substantial controversy." And FRCP 56(d) then mandates:

> "Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

FRCP 56(e) provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party *may not rest upon the mere allegations or denials of his pleading but his response* by affidavits or otherwise as provided by this rule, *must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.*" (Ital. Added)

The plaintiff here failed to submit anything under FRCP 56 to controvert the facts in defendant's affidavits and exhibits.

As FRCP 56(e) provides, plaintiff cannot rely on its pleadings for that purpose. And *Wright, Law of Federal Courts, p. 144 (2d ed. 1970)* makes it clear that

> "Allegations in the pleadings do not create an issue as against a motion for summary judgment."

Moreover, a memorandum or brief, such as the memorandum filed by plaintiff, cannot be used to defeat a motion for summary judgment. That memorandum plainly does not satisfy the provisions in FRCP 56(e). Statements in decided cases substantiate that conclusion.

Thus, the court stated in *James* v. *Port Line Limited,* 51 F.R.D. 216, 218 (E.D. Pa. 1971):

> "Plaintiff having had an opportunity to do so, has filed no affidavit in support of its opposition to defendant's motion. There has been no effort to meet the factual matters set forth in his own deposition. Our Circuit Court has repeatedly held that statements of counsel in briefs and in oral arguments are not evidence and consequently such statements cannot be used to create an issue of fact here."

Similarly, another court said the following in *Schoenbaum* v. *Firstbrook,* 268 F. Supp. 385, 390 (S.D.N.Y. 1967):

> "Again, these documents do not meet the standards prescribed by Rule 56(e). Certainly, statements in briefs are not considered as evidence on a summary judgment motion and do not controvert evidence submitted by the movants."

Nor is it a basis, for denying summary judgment under FRCP 56, that a trial may produce some opposing evidence to controvert facts shown on a motion for summary judgment. Thus, *Wright and Miller, Federal Practice and Procedure, Vol. 10, p. 489* states:

> "Moreover, the party opposing the motion cannot discharge his burden by alleging legal conclusions, nor is he entitled to a trial on the basis of a hope that he can produce some evidence at that time."

In *Buckley* v. *Vidal,* 327 F. Supp. 1051, 1055 (S.D.N.Y. 1971), the court likewise said:

> "The possibility that he might elicit something on cross examination, when there is no indication of what that might be specifically, cannot defeat a motion for summary judgment."

Judge Learned Hand made the observation in this manner in *Radio City Music Hall Corp.* v. *U. S.*, 135 F. 2d 715, 718 (C.A. 2, 1943):

> "It [the United States] says that, given time, it may find that some of these were 'employees' and that we should not take away its chance of doing so. That does not make a 'genuine issue', Rule 56(c), Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, or a 'substantial controversy'."

Moreover, this court of appeals has cautioned that a party will not be permitted to use the device of omitting a response to a motion for summary judgment, in order to reserve or "spring" evidence for use at a trial thereafter. This court has said in *Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469, 473 (C.A. 2, 1943), in affirming summary judgment for a defendant:

> "If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise unsubstantial . . .
>
> "So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions."

(d) The District Court's Memorandum, On Its Denial of Defendant's Motion for Summary Judgment, Contains a Number of Erroneous Statements, Which Apparently Contributed to That Denial.

The District Court accompanied its denial, of the motion for summary judgment, with a "ruling" or memorandum, which gives that court's reasons for denying the motion.

(See Doc. No. 21 in Record on Appeal.) Those reasons are not valid.

First, the court in that "ruling" says that defendant only asserted "conclusory allegations." However, a reading of the two affidavits and the 18 exhibits will show that great detail, with supporting evidence, was presented by defendant rather than "conclusory allegations."

By way of random sampling, the affidavits show statements of specific events and give specific dates and dollar amounts involved. As an illustration, the nature and extent of assets of the delinquent corporation, McFaddin, are discussed in detail, and the detail was supported by accounting financial statements of that corporation (see Exs. D, E and F to affidavit of Tobias Weiss), by a detailed computation of anticipated profit (see Ex. G), and by an extract from records of the Interstate Commerce Commission (see Ex. H to affidavit of Tobias Weiss). With respect to the condition of the McFaddin equipment, there were furnished to the court certain testimony, and letters from Mack Trucks and Neptune Moving (see Exs. B and C to affidavit of Louis DeBeradinis, Jr., and Ex. I to affidavit of Tobias Weiss). With respect to the sale of the McFaddin corporation by defendant DeBeradinis to the purchaser, Adley, there is not only detail in the affidavits but there was furnished a copy of a contract (see Ex. A to affidavit of Tobias Weiss), which related to the element of control. With respect to the payment of the delinquent taxes, letters from the records of the Internal Revenue Service were furnished (see Exs. L and M to affidavit of Tobias Weiss). With respect to the refusal of IRS to move against McFaddin's assets to collect the delinquent taxes, even though there were liens on those assets for those taxes, the specific liens were shown at page 5 of the affidavit of Tobias Weiss, and in addition the court was given the testimony of the Assistant Chief of Collections in the District Director's Office (see Ex. O to affidavit of Tobias Weiss). With respect to Adley's appropriation of those assets, the detail in the affidavits

was supported by an opinion from the Superior Court of Connecticut (see Ex. C to affidavit of Tobias Weiss).

The foregoing are only illustrative. Moreover, it is to be remembered that the detail in those affidavits was presented to the court under oath in the form of sworn affidavits.

It is clearly inaccurate to say, as the district court did, that defendant presented only "conclusory allegations."

Secondly, the district court asserted that "genuine issues of material fact remain to be decided." But that statement is only a general conclusion without support in the record. The plaintiff did nothing to create or show the existence of such issues of fact, as discussed above. The court appeared to be speculating that, if there were a trial, there might be such issues. However, the cases discussed above show that is not a proper basis for denying summary judgment or for failing to make an order under FRCP 58(d) as to uncontroverted facts which are deemed established for trial purposes.

Thirdly, the court, at pages 2-3 of its "ruling", relies on cited cases to support its disposition in the present case. However, the cited cases are different from the present case. All of them involved motions by opposing sides, with material submitted by the opposing sides. Here the plaintiff submitted nothing under FRCP 56. Indeed, in *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780, summary judgment was granted. The cited cases do not support the denial of summary judgment in the present case or the refusal to issue an order under FRCP 58(d).

Fourthly, the district court in its "ruling" refers several times to defendant being a "responsible officer." However, *with respect to the three-month period involved in this case,* the defendant did not assert in any way that he was a "responsible officer." Indeed, just the opposite position was taken and is shown by defendant in the affidavits and supporting exhibits.

(e) The District Court's Disposition, of Defendant's Motion for Summary Judgment, Was Erroneous.

In view of the foregoing circumstances and the requirements of FRCP 56 and of the applicable cases, the denial of defendant's motion for summary judgment, without more, was erroneous. The district court should have either: (1) granted the motion for summary judgment, or (2) at the very least, it should have made an order pursuant to FRCP 56(d) specifying the facts deemed established for trial, if it found that those facts were insufficient for judgment. In doing neither, it is respectfully submitted that the district court committed error.

See *Schulman* v. *Buck Finn, Inc.,* 350 F. Supp. 853, 855 (D. Minn. 1972), where the court said:

> "Since in the instant case plaintiff has made no attempt to set forth any specific facts showing that there is a genuine issue for trial with regard to the patent infringement claim against the two moving defendants, the Court must assume that there is no such genuine issue. Summary judgment will therefore be entered against the plaintiff. . . ."

See also *Donnelly* v. *Guion,* 457 F. 2d 290, 293 (C.A. 2, 1972).

II.

There Was No Evidence At All to Support the District Court's Crucial Finding That the IRS Penalty of $34,055.59 Was Imposed Only for the Period April 1, 1959 to May 21, 1959 Rather Than for the Entire Second Quarter of 1959. That Finding is Against All the Evidence In the Case.

The district court, after trial, made the following finding of fact (Doc. No. 27, p. 7, finding 11):

> "11. For the period April 1, 1959 to May 21, 1959, withholding and FICA taxes amounting to $34,055.59

became due the United States from McFaddin. That amount, here claimed by the government, was not withheld and paid over to the government when due. (Pl. Exs. 5, 9.)"

That finding is not only contrary to, but contradicted by, all the evidence in the case, including admissions by the plaintiff and the IRS.

(a) The Importance of the Finding.

This finding of fact becomes important if defendant DeBeradinis is found to have been a "responsible officer" in relation to McFaddin at any time during the second quarter of 1959 (April, May, June).

The question then arises as to when, during that second quarter, DeBeradinis ceased to be a "responsible officer," in view of the control of the McFaddin corporation and business which he turned over to Adley in connection with the sale to Adley. To the extent that he ceased to be a "responsible officer" *during* the second quarter, he would not be responsible for any tax collected after he was no longer a "responsible officer," and the penalty would be excessive to the extent that it relates to such subsequent time, as discussed hereafter.

In that connection, the shift of control from DeBeradinis to Adley went through two phases. In the first phase, because approval of the Interstate Commerce Commission ("ICC") had not yet been obtained, the shift in control had to be on a de facto, internal basis, without publicizing that fact. In the second phase, when approval of the ICC had been obtained to the shift in control, Adley's control of McFaddin became de jure and external, and notice of that fact was then publicized. That ICC order was issued on May 21, 1959, and was introduced in evidence as Ex. B.

Plaintiff does not appear to argue that DeBeradinis was a "responsible officer" after May 21, 1959; and the above

finding of the court appears to indicate that DeBeradinis should not be held responsible for what occurred after May 21, 1959. In any event, if defendant's other contentions herein were rejected on the question of "responsible officer," May 21, 1959 would be the last date as of which DeBeradinis could be treated as a "responsible officer."

Therefore, if the delinquent taxes amount to $34,055.59 for the entire second quarter, the penalty asserted in that amount against DeBeradinis is improper, and the judgment of the trial court is erroneous, as discussed hereafter. The evidence shows that in fact the amount of $34,055.59 does relate to the entire second quarter, and that the contrary finding and judgment of the trial court are erroneous.

(b) The Evidence.

The evidence on this point, the period to which the $34,055.59 relates, is as follows:

1. *The Government's answers to interrogatories.* Defendant submitted two sets of interrogatories to the Government, and the Government's answers to those interrogatories state that the amount of $34,055.59 is for the entire second quarter of 1959. The interrogatories and the answers are in evidence as Ex. T and Ex. U. The court is respectfully referred to the questions and answers of pars. 5 and 6 of Ex. T; and to the questions and answers in pars. 1, 5 and 6 of Ex. U. Those questions and answers are reproduced in the appendix being filed herewith. Thus, par. 5 of Ex. T states that $34,055.59 is for "the second quarter of 1959," without being limited to May 21, 1959; and par. 6 of Ex. T states "defendant remains liable for the 100 percent penalty . . . for the second quarter of 1959, in the amount of $34,055.59, plus accrued interest," again without being limited to May 21, 1959.

2. *The complaint.* Par. 7 of the complaint herein states the amount of the penalty and the period to which it re-

lates. That allegation of the Government lists the amount of $34,055.59 for the "SECOND QUARTER 1959," without limitation to May 21, 1959.

3. *Lien statement filed by IRS.* Ex. W is an IRS form, "Notice of Federal Tax Lien," filed by IRS with the Town Clerk of Stamford, Connecticut, showing the amount claimed from DeBeradinis. With respect to the amount of $34,055.59, Ex. W expressly states, in the last line of its second column, that the amount is for the "Period Ended" 6/30/59. This directly contradicts any assertion that the amount is for a period ending May 21, 1959.

4. *Affidavit of debt of IRS.* In the present case, the Government introduced into evidence, as Ex. 9, an affidavit of debt by an IRS official. Ex. 9 likewise shows a "Liability Assessed" of $34,055.59 for the "Taxable Period" stated there as "2nd Qtr. 1959."

5. *IRS Certificate of Assessments.* This is another IRS document, in evidence as Ex. 5, which expressly states the date "6/30/59" for the period for which the $34,055.59 applies, again contradicting the court's finding.

Thus, the evidence without exception, even including the Government's evidence, shows that the $34,055.59 is for the entire second quarter of 1959 and not for a period ending May 21, 1959. Indeed, Ex. W and Ex. 5 show the IRS expressly stating that the amount is for a period ended June 30, 1959.

In support of its finding 11, quoted above, the court refers only to the Government's exhibits 5 and 9. Both of those exhibits are discussed above, and they not only do not support the time limitation in the court's finding but contradict it.

The judgment below (Doc. No. 28) likewise incorporates the court's limitation of May 21, 1959. That limitation in the judgment is likewise clearly erroneous.

III.

It is Erroneous to Assert a Penalty Against Defendant for the Entire Second Quarter of 1959.

The amount of $34,055.59 has been shown to relate to the entire second quarter of 1959. If defendant ceased to be a "responsible officer" *during* that quarter, as is discussed hereafter, it is improper to charge him with a penalty for the entire quarter, even if defendant were a "responsible officer" at any time during that period.

In *Ponkey* v. *Campbell,* 62-1 USTC ¶ 9242 (D.C. Tex. 1961), the tax under § 6672 was involved for the first quarter of 1958. The taxpayer claimed that he had retired in the middle of February 1958. The court, in its charge to the jury, said that, if the taxpayer established his retirement at that time, he would not be liable at all for that period under § 6672.

In *Sherwood* v. *U. S.,* 246 F. Supp. 502 (E.D.N.Y. 1965), the court held that an officer, who became ill during a quarter, would be excused under § 6672 from the date of his illness.

Under these cases, a person no longer exercising the required authority (as where DeBeradinis was replaced by Adley which moved into control of McFaddin's financial affairs), does not act "willfully" and is not the party charged with the duty to collect and pay over the tax.

IV.

Imposition of a Penalty Under § 6672 is Improper in the Present Case Because Defendant is Not Liable for Unpaid Tax in the Face of the IRS Refusal or Deliberate Failure to Collect the Tax.

The reason the amoun. of $34,055.59 remains unpaid is the refusal or deliberate failure of IRS to collect the tax, in the circumstances set forth below. Defendant should not be penalized for a delinquency of IRS, committed in the face of notice and request by defendant. This is particularly so in the context of the manner in which IRS administers the penalty under § 6672.

(a) The IRS Administration of § 6672.

IRS imposes a penalty on the "responsible officer" only to the extent that the tax remains uncollected. If in some manner the tax is collected in whole or in part at a time after the due date at which it should have been paid over to IRS, the § 6672 penalty imposed on the "responsible officer" is reduced accordingly.

An example of that IRS practice exists in the present case. The original penalty imposed on DeBeradinis by IRS was $134,816.17, as shown by Ex. W, a notice of tax lien dated April 18, 1961. Subsequently there were collections made on the unpaid taxes; and, by the time the present action was started, the penalty against DeBeradinis asserted by IRS was reduced to a total of $73,736.32, as shown by par. 7 of the complaint herein. After this action was started, a further payment was obtained on that amount, and the penalty was reduced by IRS to the $34,055.59 amount discussed above.

To the extent that further collection or satisfaction of the unpaid tax was readily available, at least in the circumstances described below, DeBeradinis was prejudiced by the refusal or deliberate failure of IRS to act, and the

penalty asserted against him should be reduced accordingly.

(b) Notice to IRS, Request by DeBeradinis, and Refusal and Deliberate Failure by IRS.

The following facts are indisputable, established largely by evidence from IRS records or testimony of an IRS collection official:

1. When DeBeradinis entered into the transaction with Adley, and turned the McFaddin business over to Adley, IRS was informed.

2. While under control of DeBeradinis, McFaddin had entered into an arrangement with IRS in 1958 for monthly payments on the delinquent McFaddin taxes. As long as DeBeradinis controlled McFaddin, those payments were made.

3. When IRS was informed of the Adley takeover of McFaddin, IRS officials met with Adley officers, and the latter agreed to see to it that the monthly payments would be made. That arrangement with Adley was accepted by IRS.

4. Adley made two monthly payments, and then stopped all payments to IRS. IRS inquired of Adley about further payments but Adley refused to make any.

5. Adley had taken over very substantial assets of McFaddin.

6. Those McFaddin assets had tax liens on them for the unpaid McFaddin taxes. There was more than enough equity in those assets to satisfy the tax lien claims and their position of priority.

7. Adley ignored the U. S. tax liens and appropriated to itself or for its benefit the McFaddin assets (including

the tax liens) and destroyed the McFaddin business. That happened at the time Adley refused to make any further payments to IRS.

8. DeBeradinis was concerned about the payment of the delinquent taxes, which had been a factor in his sale of McFaddin to Adley, and informed IRS that Adley was appropriating the McFaddin assets and was destroying the McFaddin business. DeBeradinis repeatedly asked IRS to proceed against the McFaddin assets and enforce the tax liens, in order to get the taxes paid.

9. Notwithstanding the notice and informatiton to IRS, and in the face of the repeated requests of DeBeradinis, IRS refused or deliberately failed to proceed against McFaddin's assets in Adley's hands.

10. If IRS had moved against the McFaddin assets as requested by DeBeradinis, there would be no unpaid McFaddin tax at present, and there would be no § 6672 penalty asserted against DeBeradinis at present.

The evidence supporting the foregoing facts is analyzed and cited in great detail in the proposed findings of fact filed by defendant with the trial court, and appear as Doc. No. 26 in the Record On Appeal. The court is respectfully referred to the following in Doc. No. 26: proposed findings 4 through 17, 21 through 39, 46 through 53, 56 through 65, and 66 through 85.

In particular the court is respectfully referred to the following evidence from governmental sources and which cannot be denied:

(1) Letter of McFaddin making an arrangement with IRS for payment of monthly installments on the unpaid taxes, and showing approval by IRS (Ex. C, a certified copy from IRS records).

(2) Letter of Revenue Officer Beach, showing default of Adley and knowledge by IRS (Ex. D, a certified copy from IRS records).

(3) Certified copy of transcript of testimony of Michael D'Ambrosio, Assistant Chief of Collection in IRS District Director's office, showing the IRS arrangement with Adley, and the IRS refusal to act against McFaddin's assets (Ex. E).

(4) The following from a certified copy of a record of the Interstate Commerce Commission, taken from Ex. A: two contracts between DeBeradinis and Adley; a statement of McFaddin's equipment and financial statements showing McFaddin's assets; an analysis of the profit Adley expected to make out of McFaddin.

For the convenience of the court, the foregoing are reproduced in the appendix filed herewith.

(c) In the Foregoing Circumstances, It is Improper to Impose a Section 6672 Penalty on DeBeradinis.

Action against the McFaddin assets was the only practical course for collecting the outstanding taxes, and it was a simple, conventional procedure to enforce the U. S. tax liens on those assets by levying on those assets. Such levy could be made under the conventional procedure of § 6331 of the Code.

See the recent Supreme Court decision, *Phelps* v. *U. S.*, 43 U.S. Law Week 4590 (May 20, 1975); *The Collection Process,* IRS Publication 586 (Jan. 1974). With respect to the priority for taxes of an insolvent taxpayer, see 31 U.S.C. § 191.

It is submitted that what the court said in *Tozier* v. *U. S.*, 65-2 USTC ¶ 9621 (W.D. Wash. 1965), in its finding XXXVIII, should apply here:

> "That the failure of the defendant [United States] to collect any withholding taxes and employees' por-

tions of FICA from National was due to its [United States] own acts and conduct in permitting, causing or suffering assets of said corporation to be dissipated, lost or paid to persons or entities whose claims or charges were inferior and subordinate to the defendant's claims for such taxes."

See also *Dudley* v. *U. S.*, 428 F. 2d 1196 (CA 9, 1970), where a check was sent to IRS for withheld taxes, but IRS failed to deposit the check promptly. During the delay, other creditors were paid, so that there were no funds left to pay the check to IRS by the time that check was deposited. The court ruled against IRS efforts to impose the § 6672 penalty on the person who sent the check to IRS. The court held that the fault for nonpayment was on IRS, and the penalty therefore was not proper.

Heretofore, in response to these cases, the Government has argued that collection of taxes, and the method used by the IRS, is a matter of administrative discretion for IRS. The question, however, is the imposition of a penalty on an individual in the above circumstances, where he has sought to have the tax collected, where collection of the tax was readily available through a standard procedure, where that procedure was the only practical course available, where the IRS was fully informed, and where the IRS nevertheless deliberately chose not to act. That choice may be within the discretion of the IRS, but that is not the question here. It is, rather, bearing in mind the manner in which § 6672 is administered by the IRS and the circumstances involved here, whether DeBeradinis should be penalized for the choice the IRS makes and particularly for its own inexcusable refusal to act, regardless of whether that is within its discretion. We respectfully submit that a penalty on DeBeradinis is not properly applicable here.

V.

DeBeradinis Was Not a "Responsible Officer" of McFaddin During the Second Quarter of 1959. If He Was Such a "Responsible Officer," It Was Only for a Portion of That Second Quarter.

The following facts are beyond dispute:

1. McFaddin had been in financial difficulty in years leading up to 1959, and in 1959 its financial problems grew worse. That is shown by the ICC application in evidence as Ex. A, parts of which are in the appendix filed herewith.

2. Prior to 1959, DeBeradinis had negotiated with Adley for the sale of the McFaddin business to Adley.

3. Adley had made a study of the McFaddin business, and, based on keeping the McFaddin operations in the condition it found when it made its study, Adley expected to make a profit out of McFaddin. Adley's computations are shown in an ICC document reproduced in the appendix filed herewith.

4. Adley signed two contracts with DeBeradinis on April 20, 1959, for the purchase of McFaddin (through purchase of all its stock) and for taking over control of McFaddin. Those contracts are in evidence as Ex. A1 (sales contract) and Ex. A2 (management contract). The latter expressly provides for "sole and exclusive" control in Adley.

5. Adley agreed to pay $125,000 over and above all the debts and obligations of McFaddin. That required immediate control of McFaddin operations by Adley, to be sure that McFaddin's income, expenses, and obligations were not materially altered. However, because of regula-

tion by ICC, that control had to be taken on an internal basis, without external publicity, until ICC approval was obtained.

6. It took time to draft and clear the two contracts signed on April 20, 1959, and the agreement between the parties had to have been reached in the weeks prior to April 20, 1959 when they were executed.

7. Applications were filed with the ICC on May 7, 1959, for ICC approval for the shift of control and the sale of McFaddin to Adley. The application dealing with the shift of control to Adley is a certified ICC copy in evidence as Ex. A. That application includes extensive information, and its preparation had to be done in weeks prior to May 7, 1959.

8. On May 21, 1959, the ICC issued an order approving Adley's takeover of control of McFaddin. At that point, the change in control could be publicized externally.

The evidence demonstrating the above events, in addition to the exhibits mentioned, is analyzed and referred to in detail in Doc. No. 26 of the Record On Appeal and therefore is not repeated here.

The foregoing events, and the shift of control of McFaddin from DeBeradinis to Adley at least by April 20, 1959, is demonstrated by the contracts signed between DeBeradinis and Adley. The following in particular are to be noted about those contracts, which are in evidence as Ex. A1 and A2:

1. Under par. 3 of the sales contract (Ex. A1), the sales price was geared into an audited balance sheet as of December 31, 1958 (audited by Adley's accountants at New Haven: Kircaldie, Randal & McNab), and the sales price was not to be adjusted for changes after that date "in the usual and ordinary course of business." It was

therefore necessary that Adley control the McFaddin operations in order to protect itself against those changes. Under the sales contract, because of its exposure on the purchase price and in view of the very poor and rapidly deteriorating condition of McFaddin, Adley had to, and did, assume control of McFaddin's business operations when the sale understanding was reached between DeBeradinis and Adley, and certainly no later than April 20, 1959. While there was reference to ICC approval as a matter of substance Adley could not await that approval in the light of its serious exposure under the contract, and had to take over in anticipation of that approval which everyone expected would be granted, as in fact it was granted.

2. The second "whereas" paragraph in the management contract (Ex. A2) substantiates the dire financial condition of McFaddin, and shows why DeBeradinis had to submit to Adley's terms:

> "because of decline in revenues, McFADDIN is now being operated at substantial losses and is unable to pay and discharge its respective obligations as they mature in the ordinary course of business and is unable to secure the necessary capital because of such conditions;"

3. Pars. 1 and 3 of the management contract (Ex. A2) show the "complete, exclusive and plenary control" of McFaddin which Adley demanded until the sale was consummated. That control was taken no later than April 20, 1959.

4. Par. 4 of the management contract shows that, prior to its execution on April 20, 1959, all of DeBeradinis' stock in McFaddin had been placed in escrow, together with his resignation as an officer and director of McFaddin, subject to Adley's demands. Adley then controlled the stock, directors and officers of McFaddin. Thus, that par. 4 pro-

vides in part:

> "The Second parties [DeBeradinis and his brother] *have caused* all of the shares of the First Parties [McFaddin and another corporation] to be transferred upon their respective books at Fairfield County Trust Company, Stamford Branch, Stamford, Connecticut, as Escrow Agent, together with the executed and undated resignations of all officers and directors of First Parties. The said Escrow Agent, upon written demand of ADLEY at any time during the term hereof, shall accept any or all of said resignations, shall call regular or special meetings of stockholders of said First Parties . . . and shall give ADLEY proxies and powers of attorney to vote all of said shares. . . ." (Ital. Added)

It is to be noted that this provision says that the parties "have caused" the deposit of the stock and resignations, showing that it was done prior to April 20, 1959 (the date of the contract), in response to Adley's demand for control.

Under the contractual arrangement between DeBeradinis and Adley, DeBeradinis surrendered and Adley took over complete and exclusive control of McFaddin. That was done prior to the second quarter of 1959, but certainly no later than the time at which the contracts were executed on April 20, 1959. Until the ICC approval was obtained on May 21, 1959, that complete and exclusive control in Adley had to be kept on a de facto, internal basis; and, beginning with May 21, 1959, that control in Adley could be exercised publicly.

(a) Under the Foregoing Circumstances, DeBeradinis Was Not a Responsible Officer During the Second Quarter of 1959.

The courts have made it clear that, to be a "responsible officer" under § 6672, actual control is determinative and

not the paper title or label which may attach to a person. That actual control, over all phases of McFaddin's operations including its finances and the disbursements of its income, was in Adley during the second quarter of 1959. In the words of the management contract, that control of Adley over McFaddin was "complete, exclusive and plenary."

Thus, in *U. S.* v. *Smilen,* 63-2 USTC par. 9811 (E.D.N.Y. 1963), the business was controlled by a father, and his son, the treasurer, acted only on the instruction of his father. Despite his title, the son was held not to be a "responsible officer."

In *Dudley* v. *U. S.,* 428 F. 2d 1196 (C.A. 9, 1970), the president of a corporation made an agreement with another party under which the latter received increasing control over the corporation. Holding that the president was not liable for the § 6672 penalty, the court of appeals stated (at p. 1201):

> "Although Dudley retained the title of corporation president during the period in question, the holding of corporate office does not, per se, impose liability upon the officeholder. Monday v. United States, supra, 421 F 2d at 1214; Campbell v. Nixon, 207 F. Supp. 826, 829 (E.D. Mich. 1962). The court in *Campbell* stated: 'If, having the duty to make payment, plaintiff was prevented from discharging it by the actions of other persons in the corporation, he must be relieved of liability.' 207 F. Supp. at 830."

The test of actual rather than titular control, under § 6672, was put as follows in *Ferguson* v. *Warren,* 63-2 USTC ¶ 9783 (W.D. Wash. 1963), at p. 90,094:

> "A person responsible for taxes is one who has the power to decide what corporation bills should or should not be paid and when. Stated another way, if a corporation did not have enough money to pay all of its creditors, the person who had the power

> to decide which creditors to pay and which creditors not to pay is a person responsible for payment of the corporation taxes within the meaning of the law we are dealing with in this case."

Thus, DeBeradinis in fact submitted his resignation as an officer and director of McFaddin by or before April 20, 1972. However, even if he retained that title while Adley had actual control or while he acted only on Adley's instructions, he would not be a "responsible officer."

In *Mueller* v. *Nixon,* 470 F. 2d 1348 (CA 6, 1972), it was the Government which claimed that de facto actual control constituted the "responsible officer" under § 6672, just as Adley had de facto actual control in the present case. The court sustained the Government's claim, and held that, where a corporation was in financial trouble and was put under operating control of a finance organization, that organization was the "responsible officer." That is the same kind of de facto control which Adley had exclusively in the present case.

After Adley took control of McFaddin, DeBeradinis, signed some papers for McFaddin. However, very little of that happened during and after the second quarter of 1959. More importantly, however, all those papers signed by DeBeradinis were prepared by Adley (or its employees or representatives such as Adley's accountants), under Adley's control and instruction, and were sent to DeBeradinis for signature and returned to Adley's employees or representatives. DeBeradinis acted only in a mechanical capacity, without authority, during and after the second quarter of 1959, and the signing of papers (or even signing some checks, as in *Lowe* v. *U. S.,* 63-2 USTC ¶ 9793 (D.C.Tex. 1963) does not make DeBeradinis the responsible officer liable for the 100% penalty, under the cases discussed above.

A very clear objective landmark, showing that at least as of that time Adley had to take over control of McFad-

din, is the signing of the two contracts between DeBeradinis and Adley on April 20, 1959. As shown heretofore, the terms of the sale price as provided in the sale contract, made it essential for Adley to take over sole control of McFaddin no later than that date. Even if control passed to Adley on April 20, 1959 rather than on or before April 1, 1959, at the very least DeBeradinis would not be liable for the 100% penalty with respect to the McFaddin taxes after April 20, 1959.

In the present case, Adley took control of McFaddin as a result of contractual arrangements between DeBeradinis and Adley which were put into effect no later than April 20, 1959. Once those contracts were executed, and DeBeradinis had put his stock in escrow and had submitted his resignations subject to Adley's demand, Adley was firmly entrenched and DeBeradinis was excluded. Adley, and not DeBeradinis, was the "responsible officer."

(b) The District Court's Findings On Control of McFaddin Were Against the Weight of the Evidence.

The basic finding of the district court on the question of control of McFaddin appears in its finding no. 12(c), in which it is stated:

> "Prior to April 1, 1959 and through at least December 8, 1959 he [DeBeradinis] was director, president and principal shareholder of the stock of McFaddin."

In addition, that finding continues:

> "He continued to have authority to sign checks for McFaddin after April 1, 1959 until May 25, 1959."

That finding is overwhelmingly negated by and inconsistent with the evidence. The first portion of the discussion under this Point V presents objective evidence, not dependent on any testimony, and shows that, either for

the entire second quarter of 1959 or at least for that quarter after April 20, 1959, Adley and not DeBeradinis was in control of McFaddin. In addition, the remaining evidence is presented in great detail, with specific references, in defendant's proposed findings nos. 21 through 39 in Doc. No. 26 of the Record on Appeal.

To show how lacking in support the above finding of the district court was, it is instructive to examine the references cited there by the court as the basis for that finding:

1. The district court referred to the testimony at Tr. 39, 40, 41. However, that testimony not only does not support the district court's finding but contradicts it. Thus, that testimony was as follows:

> "Q. As of April 1, 1959, did the expenditure of McFadden funds require your approval? A. No. We were—
>
> "The Court: Answer it 'Yes' or 'No' or 'I don't know' or whatever else it might be.
>
> "The Witness: No.
>
> "By Mr. Weiss:
>
> "Q. Whose approval was required for the expenditure of McFadden funds at that time? A. Michael Adley.
>
> "Q. And as of that time, April 1, 1959, were you signing checks drawing on funds of the McFadden Corporation? A. (No response.)
>
> "The Court: Well, don't you know?
>
> "The Witness: Yes, I did.
>
> "The Court: You signed checks?
>
> "The Witness: Yes, I did. Payroll checks.
>
> "The Court: Well, that, of course indicates something else again.
>
> "The Witness: I—

"The Court: Don't answer anything else. You have already answered.

"The Witness: I made a mistake.

"The Court: Wait a minute now. I want you to understand this. You are not to volunteer anything. You know what I mean?

"The Witness: I answered in error, Your Honor, and I wanted to correct it.

"The Court: Well, correct your error by all means. Now, what question are you changing as to your answer?

"The Witness: About the signing of the checks as of April 1st.

"The Court: Well, what do you want to make it now?

"The Witness: I did not sign checks as of April 1st.

"The Court: All right.

"By Mr. Weiss:

"Q. Well, who did sign the checks?

"The Court: What checks?

"Mr. Weiss: The checks drawing on the funds of the McFadden Corporation as of April 1, 1959.

"The Witness: Ray Boddy."

2. The district court also referred to Tr. 98 and 99 to support its finding, but that testimony likewise does not do so. Thus, the testimony was as follows (starting at the bottom of Tr. 97):

"Q. After April 1, 1959, did McFadden continue to have a work force? A. No. The work force was changed. They were laid off as McFadden employees and re-hired as Adley employees.

"Mr. Weiss: Now, Your Honor—

"The Court: Did McFadden turn over any money

to the Adley Corporation for withholding tax or social security of these employees?

"The Witness: Adley—

"The Court : Yes or no?

"The Witness: Yes. It took the accounts receivable.

"The Court: Accounts receivable. I don't understand what you mean by that.

"The Witness: Monies that were in the bank, the bank deposits. They took over everything.

"The Court: You passed McFadden, then paid monies from its bank account over to Adley; is that right?

"The Witness: Adley took all the assets of McFadden, sir, including its bank accounts, whatever it owned.

"The Court: And I assume that nothing had been set up for the withholding tax or the social security of these employees during that period; is that correct?

"The Witness: Well, they were the responsible parties. They took the Company over with the agreement they were going to pay it.

"The Court: Well, I don't think that is going to be any defense here, Counselor. They can't shed their obligations. I think that is well established."

3. The district court further referred to Tr. 162 and 163, but that testimony, which was as follows, also does not support the court's finding:

"The Witness: Ray Boddy, who was the office manager-comptroller of my company, had the free running of the company's finances and had the right to sign checks without my signature on them. That is why I raise the question if he had the title or not. I believe he did.

"The Court: Did you also have the right to sign checks?

"The Witness: Yes, which I never exercised.

"The Court: You had the right to sign them?

"The Witness: Yes. I did.

"Mr. Weiss: As of what time?

"The Court: In 1959, in March.

"The Witness: Prior to April of '59.

"The Court: You had the right, but you say you never signed any checks?

"The Witness: I wouldn't sign payroll checks or anything like that. If I went out and bought equipment, I might.

"The Court: You signed some equipment checks?

"The Witness: Yes.

"The Court: Did you sign equipment checks in April?

"The Witness: No.

"The Court: In March?

"The Witness: No."

4. The district court also referred to Exs. 6, 7 and 8. Ex. 6 is a plea to IRS to collect the unpaid taxes of McFaddin, and is devoted to showing the sufficiency of the McFaddin assets and their misppropriation by Adley after May 25, 1959, when Adley became able to deal publicly with the McFaddin assets because of the ICC order issued on May 21, 1959. Exs. 7 and 8 are respectively McFaddin's income tax return for the year ended June 30, 1959 and an application for extension of time to file that return. While they were signed by DeBeradinis, they were prepared by Adley's accountant and were signed on instructions of Adley, as explained above. Moreover, that return covered a year starting June 1, 1958, as stated by DeBeradinis at Tr. 192, and for a large part of that year he had not yet turned over McFaddin to Adley. In any event, these exhibits are only a few strands in a large body of evidence which is contrary to the court's finding.

VI.

DeBeradinis Was Entitled to Have Applied Against Any Penalty He May Have Owed, the Funds He Recovered For the Government Through His Litigation Against Adley.

DeBeradinis filed suit against Adley in 1965, because of the refusal of IRS to proceed against the McFaddin assets or against Adley for its misappropriation of those assets. That litigation continued for eight years, in numerous courts, with several appeals, and finally culminated in a recovery, out of which IRS received $72,640 to be applied on unpaid McFaddin taxes. The long, difficult course of that litigation was sustained by DeBeradinis, through thousands of hours of work by him, through his initiative, and through payment which he obtained for expenses. The nature and extent of that litigation is set forth in detail in Ex. Y. The Government did not participate at all in that litigation (Tr. 121-122).

The effect of that litigation was that DeBeradinis obtained $72,640 for the Government, at his expense and through his work.

One of the primary purposes of DeBeradinis in engaging in that litigation, and undertaking expense and an enormous work burden, was to relieve himself of the claims which IRS persisted in making against him. He wanted and expected that any recovery would be applied in a manner which would eliminate those IRS claims. In fact, however, IRS has manipulated the application of those funds so as to satisfy McFaddin taxes in a manner which leaves the present penalty claim against him.

IRS has issued revenue rulings which establish the order in which such a recovery by DeBeradinis should be applied. Those rulings are *Rev. Rul. 73-304,* Cum. Bull. 1973-2, p. 42,

and *Rev. Rul. 73-305,* Cum. Bull., 1973-2, p. 43. Those rulings require that the recovery should be applied to the earliest unpaid year first and then to later years chronologically; and that, within each year, the funds should be applied to tax, penalty and interest, in that order.

It is undisputed that IRS did not apply the DeBeradinis recovery in the sequence and manner prescribed by those rulings. That is shown by plaintiff's answers to the interrogatories in Exs. T and U.

It is submitted that the sequence and manner prescribed by those rulings should be followed here, and that any penalty, for which DeBeradinis may be liable, should be reduced or eliminated accordingly.

VII.

The District Court Erroneously Excluded Evidence Which Was Relevant and Pertinent to the Foregoing Issues.

The district court excluded the following evidence:

1. The amended complaint and the memorandum opinion of the Superior Court of Connecticut (see supplement to Record On Appeal). These exhibits, and particularly the findings of the Superior Court in its opinion, show misconduct by Adley responsible for the destruction of McFaddin. That is objective evidence which sustains DeBeradinis' claims to IRS, in the face of which IRS refused to act, and is relevant to the issue of the imposition of the penalty in those circumstances.

2. IRS Publication 586 (also in the supplement to Record On Appeal) concerns the collection of taxes by IRS, and the use of a levy on assets. That publication is relevant to the same issue, concerning IRS refusal to collect the McFaddin taxes.

3. Ex. G is an inventory of McFaddin equipment. It also contains appraised values for that equipment. The district court excluded those values. That appraisal is relevant to the claim that McFaddin had sufficient assets during the Adley takeover to enable collection of the unpaid taxes.

4. Testimony by DeBeradinis as to his requests to IRS to seize McFaddin assets in Adley's hands (Tr. 132-138); and testimony of DeBeradinis on the McFaddin assets turned over to Adley (Tr. 139-141). This testimony is also relevant to issue of IRS refusal to collect the McFaddin taxes.

Conclusion

Defendant is not liable for any penalty under § 6672 in the circumstances of this case.

If such a penalty is to be imposed on him, the penalty sustained by the district court is greatly excessive.

Defendant's motion for summary judgment should have been granted, since there was no response by plaintiff. At the very least, the court should have made an order under FRCP 56(d), and trial herein should have been based on the facts thereby deemed to be established for this case. The denial of the motion, and the trial held without the benefit of such facts deemed to have been established, was erroneous and prejudicial to defendant.

Respectfully submitted,

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(58920)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

LOUIS D. DeBERADINIS, JR.,

Defendant-Appellant.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 East 17th Street, Brooklyn, New York, 11230
That on November 3, 1975 she served 3 copies of Appendix and 3 copies of Brief for Appellant
on

Chief of Appellate Section,
Tax Division,
Department of Justice,
Washington, D. C. 20530

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Rose Rinella

Sworn to before me this
3rd day of November, 1975

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932360
Qualified in Nassau County
Commission Expires March 30, 1977